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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1931**

**No. 580.**

**S. B. LAWRENCE, ET AL., Appellants,**

**VS.**

**STATE TAX COMMISSION, ET AL., Appellees.**

## APPELLANTS' REPLY BRIEF.

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## APPELLANTS' REPLY BRIEF.

### POINT I.

*The tax complained of in this case is not a property tax upon income; nor is it a tax upon the money or property constituting the gain, but an excise tax on the activities of the taxpayer which produced the income, all of which took place outside of the State of Mississippi.*

The Attorney General of the State of Mississippi, at page 6 of brief, states:

*"Appellees concede that the tax imposed on Lawrence, the appellant, is an excise and not a property tax."*

While conceding that the tax is an excise tax, counsel insist that it is a direct tax upon the income of the taxpayer which may be measured by income wherever earned.

An excise tax upon the appellant in this case would be

a tax upon the activities of the appellant carried on beyond the borders of the state, and such is the interpretation, scope and effect of the act given to it by the Supreme Court of the State of Mississippi.

If, however, the tax should be held to be one upon the money or property constituting the gain, such a tax would be a property tax, and the Supreme Court of the State of Mississippi has said that the tax is not one of this nature.

It might be helpful to the Court if we should point out the difference between a direct or property tax and an indirect or excise tax.

An excise duty is an inland impost levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities. *Pollock v. Farmers' Loan & Trust Co.*, 15 Sup. Ct. 912, 915, 158 U. S. 601, 39 L. Ed. 1108; *Patton v. Brady*, 22 Sup. Ct. 493, 496, 184 U. S. 608, 46 L. Ed. 713; *Black v. State*, 89 S. W. 522, 526, 113 Wis. 205, 90 Am. St. Rep. 853; *Hancock v. Singer Mfg. Co.*, 41 Atl. 846, 851, 62 N. J. Law, 289, 42 L. R. A. 852.

In *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601, at page 627, 39 L. Ed. 1108, at page 1122, the Court used the following language in respect to direct taxation:

> "The Constitution prohibits any direct tax, unless in proportion to numbers as ascertained by the census; and, in the light of the circumstances to which we have referred, is it not an evasion of that prohibition to hold that a general unappor-

tioned tax, imposed upon all property owners as a body for and in respect of their property, is not direct, in the meaning of the Constitution, because confined to the income therefrom?

"Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?"

In the case an excise tax is defined in the following language: (158 U. S. 622, 39 Law Ed. 1120)

"Cooley, on Taxation, page 3, says that the word 'duty' ordinarily 'means an indirect tax, imposed on the importation, exportation, or consumption of goods;' having 'a broader meaning than custom, which is a duty imposed on imports or exports;' that 'the term impost also signifies any tax, tribute or duty, but it is seldom applied to any but the indirect taxes. An excise duty is an inland impost, levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities.'

"In the Constitution, the words 'duties, imposts and excises' are put in antithesis to direct taxes. Governor Morris recognized this in his remarks in modifying his celebrated motion, as

did Wilson in approving of the motion as modified. 5 Elliott's Debates, 302."

In the case of *Flint v. Stone Tracy Co.* 220 U. S. 107, at page 151, 55 Law Ed. 389, at page 413, used the following language:

> "Duties and impost are terms commonly applied to levies made by governments on the importation or exportation of commodities. Excises are 'taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges.' Cooley, Const. Lim. 7th ed. 680.
>
> "The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, i. e., with the advantages which arise from corporate or quasi corporate organizations; or, when applied to insurance companies, for doing the business of such companies. As was said in the Thomas Case, 192 U. S. supra, the requirement to pay such taxes involves the exercise of 'privileges, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable."

In the case of *Brushaber v. Union Pacific Railroad Co.*, 240 U. S. 1, at page 14, 60 Law Ed. page 493, at page 500, the court used the following language:

> "Without stating the minor differences, it may be said with substantial accuracy that the divergent reasoning was this: On the one hand,

that the tax was not in the class of direct taxes requiring apportionment, because it was not levied directly on property because of its ownership, but rather on its use, and was therefore an excise, duty, or impost; and on the other, that in any event the class of direct taxes included only taxes directly levied on real estate because of its ownership."

In the case of *Spokane & Eastern Trust Co. v. Spokane* 70 Wash. 48, 126 Pacific, 54, it is said that an "excise" is a tax upon a pursuit, trade or occupation, generally taking the form of an axaction for a license fee to pursue the particular occupation. See Ruling Case Law, Vol. 26, page 236.

The Supreme Court of the State of Mississippi, has with unanimity held that wherever income is derived from or connected with the activities of the owner that the tax is an excise tax and not a property tax. There would be insuperable objections under the Mississippi Constitution to the validity and enforcement of this tax if it were a property tax.

Section 112 of the Constitution of the State of Mississippi, (Appendix to original brief, page 58) provides taxation shall be uniform and equal throughout the State. Property shall be taxed in proportion to its value. The tax in question could not be sustained as property tax because in *Thompson v. Kreutzer*, 112 Miss. 165, and *Thompson v. McLeod*, 112 Miss. 383, 73, So. 193, the court held that the Constitution of the State of Mississippi would not permit a tax

upon the mere ownership of property or use thereof without gain.

In the case of *Chicago R. I. & P. R. R. Co. v. Robertson, Revenue Agent,* 122 Miss. 417, 84 So. 449, there was imposed upon the owners of freight cars used by any carrier in transportation a sum equal to 3 per cent of the gross earnings thereof in lieu of all other taxes. The court pointed out that a lieu tax violated Section 112 of the Constitution of the State of Mississippi. The court further decided that the tax was a property tax and that Section 112 forbade the tax in question, using the following language:

> "this requirement being twice set forth therein. In order that the equality of taxation contemplated by this section may exist, not only must all property be assessed at its true value, no substitute therefor being permissible (*Thompson v. Kreutzer,* 112 Miss. 165, 72 So. 891), but there must be no discrimination in rates between different species of property. All property must be taxed at the same rate on its true value. Neither of these requirements are here present, for gross earnings from the cars sought to be taxed are substitued for their true value, and the rate of taxation, three per cent., is different from that imposed on other property; the rate on other property for the year 1912 being six mills on the dollar. Chapter 87, Laws of 1912."

Therefore, if the tax complained of was a property tax, it would be void under Section 112 of the Constitution of the State of Mississippi; void, first, because the tax would not be equal and uniform; a person with an income of

$5,000.00 would pay one rate of taxation, and a person with an income of $50,000.00 would pay an entirely different rate of taxation. Not only that, but as the court pointed out the state tax on other classes of property in the year 1912 did not exceed six mills, whereas the tax in question was three per cent. on the gross income. The same argument would apply to this case. The tax imposed would equal five per cent of the value of the property; that is to say, the income, and yet the state levy for the year 1926 to 1930 did not exceed eight mills. (See Appendix No. 1 hereto.) We make the foregoing statement of law in the State of Mississippi in order that we may point out to the court why there were insuperable objections to the tax in question being denominated a property tax.

The question was first presented to the Supreme Court of the State of Mississippi in the case of *Grocery Co. v. Robertson*, 126 Miss. 34, 88 So. 4, 25 A. L. R. 748. In that case the appellant operated a retail grocery business, and income sought to be recovered was derived from the sale of merchandise. The question was squarely put up to the Supreme Court of the State of Mississippi in that case as to whether the tax was a property tax or an income tax. If the same should be held to be a property tax the act was invalid under Section 112 of the Mississippi State Constitution for all the reasons pointed out in the case of *C. R. I. & P. R. R. Co. v. Robertson*, 122 Miss. 417, 84 So. 449, as well as other sections of the Constitution to be hereinafter referred to. Therefore, the Supreme Court of the State of Mississippi was called upon to give the most careful and elaborate attention to the subject matter. The court was

careful to point out that the tax imposed was an excise tax arising out of and connected with the activities of the owner and not a property tax. The court used the following language:

> "But a tax on income to be paid by the recipient thereof without reference to whether he has invested, spent, or wasted it, as is the tax here in question, is not on the specific property from which the income was received irrespective of the person of the recipient, neither is a tax on the person irrespective of property; for no definition of income can be framed under which it can be dissociated from the activities of the person who produced or received it, so that a tax on income necessarily includes among its elements the production or receipt of property. (*State v. Wisconson Tax Commission*, 166 Wis. 287, 163 N. W. 639, 165 N. W. 470), *and to that extent is a tax on the performance of an act resulting in gain to the person performing it, and the rule is, and was when section* 112 *of the state Constitution was adopted, that when the tax is imposed on the performance of an act, it will not be classified as a tax on property, although it is proportioned in amounts to the value of the property used in connection with or produced by the act which is taxed.*
>
> "*Income is necessarily the product of the joint efforts of the state and the recipient of the income, the state furnishing the protection necessary to enable the recipient to produce, receive, and enjoy it, and a tax thereon in the last analysis is simply a portion cut from the income and appropriated by the state as its share thereof, and, while a tax on income includes some of the*

*elements both of a tax on property and a tax on persons, it cannot be classified as strictly a tax on either, for it is generically and necessarily an excise, and should be enforced as such unless and until so to do would accomplish the result which section* 112 *of the Constitution was adopted to prevent, which is to prevent discrimination in the taxation of property, so that all property shall bear its due proportion of the burdens of government.*

"This was the theory on which the case of *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759, and 158 U. S. 601, 15 Sup. Ct. 912. 39 L. Ed. 1108, was decided, for, as pointed out in *Brushaber v. Union P. R. Co.*, 240 U. S. 1, 36 Sup. Ct. 236, 60 L. Ed. 493, Ann. Cas. 1917B, 713, L. R. A. 1917D, 414:

*" 'The conclusion reached in the Pollock Case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but, on the contrary, recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone, and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it. Nothing could serve to make this clearer than to recall that in the Pollock Case, in so far as the law taxed incomes from other classes of property than real estate and invested*

*personal property, that is, income from 'professions, trades, employments, or vocations,' . . . its validity was recognized; indeed, it was expressly declared that no dispute was made upon that subject, and attention was called to the fact that taxes on such income had been sustained as excise taxes in the past.'"*

The court did state that a tax on income includes some of the elements of a tax on property and a tax on persons. In that case the court was confronted with the fact that the income arose from the sale of personal property, and that is what the court meant by holding that the tax had some of the elements of a tax on property. But in view of the fact that the income arose from the activities of the owner, the court said "for it is generically and necessarily an excise tax and should be enforced as such unless and until so to do would accomplish the result which section 112 of the Constitution was adopted to prevent." The court was careful to point out that the distinguishing feature between a property tax and an excise tax involved the activities of the owner. In this case we are not presented with one where the income arose from the sale of either real or personal property in Mississippi. In this case, therefore, the tax has no element whatsoever of a property tax. This tax is exclusively an excise tax upon the activities of the owner which took place outside of the State of Mississippi.

The Supreme Court of the State of Mississippi had occasion to review the case again in the case of *State ex rel. Knox, Attorney General v. Gulf, Mobile & Northern Railroad Co.* 104 So. 689, 138 Miss. 70. In that case the income

arose from the transportation of freight on the part of a Mississippi corporation and income derived as rent and from the proceeds of the sale of personal property. The statute as amended in that case said that the tax was a tax upon property, and the Supreme Court of the State of Mississippi was confronted not only with section 112 of the Constitution but with the legislative declaration that the tax was a property tax. This court, however, re-affirmed the case of *Hattiesburg Grocery Co. v. Robertson, supra,* using the folowing language:

> "The appellees' contention in this connection is that a tax on income derived from property is a tax on the property from which the income is derived, and, as the tax here imposed is on all income, it was, in so far as it affects income from property, a tax on the property from which the income was derived, which property the Constitution permits to be taxed only in proportion and according to its true value.
>
> *"This contention is ruled by Hattiesburg Grocery Co. v. Robertson,* 126 *Miss.* 34, 88 *So.* 4, 25 *A. L. R.* 748, *wherein this court, after mature consideration, held that a tax on income is an excise and is not a tax on the property from which the income may have been derived. As was there pointed out a tax on income from property includes some of the elements both of a tax on property and of a tax on persons, and cannot be classified as strictly a tax on either alone. Property of itself alone cannot produce income, but must be used or dealt with in some way by a person, before gain or income can be derived therefrom, and no definition of income though derived from*

*property, can be framed which does not include the activities of the person by whom it was produced, received, or enjoyed."*

In respect to the claim of appellees' counsel in this case, that the tax was not one directly upon the money constituting the gain, the Supreme Court of the State of Mississippi expressly held otherwise, at page 101, using the following language:

> "The appellees do not contend that a tax on income is a tax on property in the sense that it is a tax on the money or property which constitutes the gain or revenue of a person and on the aggregate of which the amount of his income is determined. That it is not such a tax, see *Hattiesburg Grocery Co. v. Robertson,* 126 Miss. 55, 88 So. 4, 25 A. L. R. 748; *Pollock v. Farmers' Loan & Trust Co.,* 157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759; Id., 158 U. S. 601, 15 S. Ct. 912, 39 L. Ed. 1108; *Brushaber v. Union P. R. Co.,* 240 U. S. 1, 36 S. Ct., 236, 60 L. Ed. 493, L. R. A. 1917B, 713."

Again, in this case a concurring opinion was delivered by Mr. Justice Holden, page 109, wherein the following language was used:

> "The income tax law in this state was upheld and declared valid by this court in the case of *Hattiesburg Grocery Co. v. Robertson,* 126 Miss. 55, 88 So. 4, 25 A. L. R. 748, about five years ago. That decision has not been overruled by any court nor annulled by the legislature; and as it positively announces the law of Mississippi, it is the duty of this court to follow it in the case now before us.

"The income tax in the instant case is the same in principle and purpose as the income tax law passed upon and held valid in the Hattiesburg case, supra. *It is not a property tax, but is an excise income tax.* This has been already decided, and is too plain for discussion."

In sustaining the validity of this income tax the court not only had to point to section 112 of the State Constitution, but likewise to section 135 which created the constitutional office of the assessor and made it the duty of such officer to assess property for taxation. The section is made Appendix 2 hereto.

In the case of *Knox, Attorney General, v. Railroad Co.*, 138 Miss. 70, supra, at page 107, in respect to this section of the Constitution the court used the following language:

"As to section 135 of the state Constitution:

"This section creates the office of tax assessor, and the appellees' contention is that the ascertainment of the amount of a person's income for the purpose of taxing it is an assessment thereof, and can be made, under this section of the Constitution, only by the regular tax assessor. This objection to the statute was disposed of in *Enochs v. State*, 133 Miss. at page 143, 97 So. 537, wherein it was said:

" 'The implied requirement of section 135 of the state Constitution, that taxes shall be assessed by the assessor and collected by the sheriff, one of whose duties is to collect taxes (as heretofore construed by this court), has no application to privilege taxes, but only to such as can only

be fixed by an assessment of, and is primarily a charge against property'—citing *State v. Adler*, 68 Miss. 487, 9 So. 645; *Thibedeaux v. State*, 69 Miss. 683, 13 So. 352.

"An income tax as hereinbefore pointed out is an excise and not a property tax."

In the case of *State v. Tonella*, 70 Miss. 701, the court held that as to a property tax the liability could only be created as a result of an assessment by the constitutional officer whose duties could not be dispensed with by the legislature. But not only that, if the tax had been held to be a property tax, not only was it necessary that the property be assessed according to its true value, but the assessment of property at its true value had reference to the value at which other property was uniformly and intentionally valued by taxing officers.

In *Green v. Louisville & I. Railroad Co.*, 244 U. S. 499, at page 514-516, 61 L. Ed. 1280, at page 1289, the court used the following language:

"It is equally plain that it makes no difference what basis of valuation—that is, that percentage of full value—may be adopted, provided it be applied to all alike. The adoption of full value has no different effect in distributing the burden than would be gained by adopting 75 per cent, or 50 per cent, or even 10 per cent as the basis—so long as either was applied uniformly. The only difference would be that, supposing the requirements of the treasury remained constant, the rate of taxation would have to be increased as the percentage of valuation was reduced. (Under Sec.

> 171 of the Constitution, the rate of taxation may be varied by the general assembly from year to year, according to requirements.) Therefore, the principal if not the sole reason for adopting 'fair cash value' as the standard for valuation is as a convenient means to an end,—the end being equal taxation. But if the standard be systematically departed from with respect to certain class of property, while applied as to other property, it does not serve, but frustrates the very object it was designed to accomplish. It follows that the duty to assess at full value can not be supreme in all cases, but must yield where necessary to avoid defeating its own purpose."

As to such valuation, the Supreme Court of the State of Mississippi had expressly admitted that the assessing officers universally assesses property in the State of Mississippi at a lower level than its true value.

In the case of *Knox, Attorney General, v. Southern Paper Co.*, 108 So. 288, 143 Miss. 870, at page 879, the court used the following language:

> *"It is a matter of common knowledge in this state that the assessing officers of the state systematically and universally assesses property in the state at a lower level than its true value."*

In the case of *Hanover Fire Insurance Co. v. Carr*, 272 U. S. 494, 71 L. Ed. 372, at pages 514-517, the Court held that where a tax was levied upon the premiums of foreign fire insurance companies and construed by the court to be a property tax value should not exceed that at which the other personal property was uniformly and customarily

assessed. Therefore, if the Supreme Court of the State of Mississippi had held this tax to be a property tax the entire scheme of income taxation would have been upset, and we respectfully submit that a tax directly upon the income itself in the hands of the taxpayer would be a direct and/or property tax.

In Appellees' brief, at page 7, the following rule is invoked:

> "In those cases relied upon by appellees the *courts hold that where the tax is not a property tax but is an excise tax, an income tax may be levied even though the income is earned by the taxpayer beyond the confines of the state.*"

It is very true, as stated by counsel, that the Mississippi cases cited are an authority for that announcement. The objections which we make to the constitutionality of the statute in question are based upon the two Mississippi cases, *Hattiesburg Grocery Co. v. Robertson*, 126 Miss. 34, 88 So. 4; *State v. Railroad Co.*, 138 Miss. 70, 104 So. 689, it being our position that the construction given by the Supreme Court of the State of Mississippi to the statute in question has the effect of imposing liability for an excise tax upon income earned in carrying on an occupation beyond the limits of the state. The prerogative of the sovereign pertains to the national authority. *Blackmar vs. United States*, 424 U. S. p..... Counsel concede that the tax is an excise tax, and that the Supreme Court of the State of Mississippi in interpreting its own statutes has given such scope and effect thereto. Counsel are in error, however, in their citation of authorities alleged to sustain the position contended for. A number of Massachusetts cases are cited. These cases are not at all in point,

because the tax imposed under the Massachusetts statute is a property tax and not an excise tax. See *Trefry v. Putnam*, 227 Mass. 522, 116 N E. 904, at page 910.

In the case of *Hart v. Tax Commission*, 240 Mass. 37, 132 N. E. 621, the court held that the tax was laid directly on the income of property and was a tax upon the property itself. The court held, however, that since the tax was measured by the income of the preceding year, and that the taxpayer did not live in Massachusetts during such year, no tax could be imposed therefor, using the following language:

> "We realize, also, that the law as to the situs of income for the purposes of taxation is not yet developed. But in view of the construction placed by this court upon the income tax of 1916, and the fact that this commonwealth had no jurisdiction over the person, property or business of the complainant during the year 1917, we are of opinion that the tax in question was invalid. On the facts disclosed by this record the complainant is entitled to the abatement claimed. In accordance with the terms of the report, judgment is to be entered in her favor in the sum of $840.77, with interest from February 28, 1920; and it is so ordered."

In the case of *Loevy v. Long, Commissioner*, 245 Mass. 174, 139 N. E. 496, (erroneously cited by appellee, *Anderson v. Savage*), the Supreme Court of Massachusetts held that where a taxpayer lived in the state any part of the year; that is to say, lived in the state nine months and out of the state three months, the income for the year should be treated as a unit in fixing the basis of the tax for the preceding year.

In the case of *Kennedy v. Commissioner of Corporation and Taxation*, ..... Mass. ....., 152 N. E. 747, the Supreme Court of Massachusetts realized that the rule was harmful and expressly departed therefrom, using the following language at page 749:

> "This construction avoids highly difficult constitutional questions which would be encountered if the sections were interpreted to subject a person removing to the Commonwealth in the latter part of any year to taxation on income received in a foreign jurisdiction while an inhabitant thereof, and thus at a time when such person derived no protection from our laws and owed them no duty. These constitutional objections have been strongly urged at the bar but need not be discussed nor decided in view of the interpretation placed on the statute. This is in accord with the principle frequently declared by the United States Supreme Court that—'A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts on that score.' *United States v. Jin Fuey Moy*, 241 U. S. 394, 401, (36 S. Ct. 658, 659, 60 L. Ed. 1061); *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 407, 408, (29 S. Ct. 527, 52 L. Ed. 836); *Bender v. Barnett*, 255 U. S. 224, (41 S. Ct. 271, 65 L. Ed. 597). *Panama R. Co. v. Johnson*, 264 U. S. 375, 390, (44 S. Ct. 391, 68 L. Ed. 748); *Lewellyn v. Frick*, 268 U. S. 238, 251, 45 S. Ct. 487, 69 L. Ed. 934."

The court said that in the case of *Loevy v. Long, Commissioner*, supra, the question was not properly presented.

In the recent case of *Hutchins v. Commissioner*, ..... Mass. ....., 172 N. E. 605, the Supreme Court of Massachusetts was presented with a case where trustees residing in Massachusetts were administering estates having a permanent situs in other states. An effort was made to tax the income arising therefrom in the State of Massachusetts. The Supreme Court of Massachusetts declined to extend the rule so as to tax the income arising from such estates, using at page 609 the following language:

> "In our opinion it follows that there was no jurisdiction to levy the taxes on the gains of the two New York trusts. For discussion of cognate questions, See *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 202, 26 S. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493; *Frick v. Pennsylvania*, 268 U. S. 473, 488-489, 45 S. Ct. 603, 69 L. Ed. 1058, 42 A. L. R. 316; *Rhode Island Hospital Trust Co. v. Doughton*, 270 U. S. 69, 46 S. Ct. 256, 70 L. Ed. 475, 43 A. L. R. 1374; *Blodgett v. Silberman*, 277 U. S. 1, 12-18, 48 S. Ct. 410, 72 L. Ed. 749; *Brooke v. Norfolk*, 277 U. S. 27, 29, 48 S. Ct. 422, 72 L. Ed. 767."

We have in our original brief directed the attention of the Court to the distinguishing features which characterize the case of *Maguire v. Trefry*, 253 U. S. 12, 64 L. Ed. 738. (Original Brief, page 38).

Counsel's brief, page 20, cites the case of *Crescent Manufacturing Co. v. Tax Commissioner*, (S.C.), 124 S. E. 761. It is not possible for us to tell from the report of the case whether the tax was a property tax or an excise tax. However, the question under review by the court was the

construction of its own statute; the power of the legislature of South Carolina to place an excise tax on income earned beyond the state was not presented to the court.

Counsel cite the case of *Royster Guano Co. v. Virginia*, 253 U. S. 412, 64 L. Ed. 989. In that case, the State of Virginia undertook to tax domestic corporations on net income received from sources both within and without the state, and to exempt certain other domestic corporations from taxation on income earned out of the state where no income was earned in the state. This Court held that the statute was discriminatory, and that the tax for income earned without the state could not be enforced against domestic corporations which earned income within the state. The question as to the right of the state to tax the corporation vel non for income earned beyond the limits of the state as an excise tax does not appear to have been presented to the Court. The tax was invalidated on other grounds.

The case of *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 62 L. Ed. 1135, cited by counsel for the appellees, is not at all in point. In that case the corporation was carrying on a manufacturing business in the State of Wisconsin. The product of its factory was sold in Wisconsin and shipped out of the state in interstate commerce. The tax was a net tax and the question presented was as to whether or not the tax was a burden upon interstate commerce. This court held that it was not that since the tax was a net tax, interstate commerce was only remotely affected. However, the court expressly held that as to income exclusively earned beyond the limits of the State of

Wisconsin no liability existed therefor. See the case in the lower court, *United States Glue Co. v. Oak Creek*, 161 Wis. 211, 153 N. W. 241, 1918A, Ann. Cas. at page 421.

In our original brief at page 34, we directed the court's attention to the case of *Arpin v. Eberhardt*, 147 N. W. 1016. In that case, it appeared that the Wisconsin statute excluded from the income tax that earned outside the state except as to intangibles. We direct the attention of the court to the suggestion that the legislature of Wisconsin was doubtless of the opinion that except as to intangibles it could not tax the income of a resident of the state exclusively earned beyond the limits of the state.

## POINT II.

*The Supreme Court of the State of Mississippi has construed the act as applicable to income earned in an occupation carried on wholly within the State of Tennessee.*

Counsel for appellees in brief take the position that the appellant is liable for the tax whether the same be called an excise tax or a direct tax on income. We desire to distinguish two cases cited by opposing counsel upon that point.

Counsel cite the case of *Shaffer v. Carter*, 252 U. S. 37, 64 L. Ed. 445. In that case, a resident of Illinois carried on an occupation in the State of Oklahoma, and was sought to be charged in the State of Oklahoma with an excise tax thereupon. The Supreme Court of the State of Oklahoma held the taxpayer liable, and on appeal to this court the taxpayer insisted that the tax sought to be imposed was a per-

sonal tax as to citizens, but a property as to non-residents. This court held that since the income was earned in the State of Oklahoma and was held to be valid therein, that an analysis of the nature of the tax was not relevant, to tax payer was liable in Oklahoma whether the tax was an excise tax or property tax and no federal question was presented thereby. The court used in addition to the language quotes in appellees' brief the following, at page 458:

> "The practical burden of a tax imposed upon the net income derived by a nonresident from a business carried on within the State certainly is no greater than that of a tax upon the conduct of the business, and this the state has the lawful power to impose, as we have seen."

Again counsel cite *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113, 65, L. Ed. 165. In that case the same question was presented as to income earned within the state; it did not make any difference whether it was an excise tax or a property tax, and the Supreme Court of the state was the final judge. The Court used the following language:

> "Second. It is contended that the tax violates the 14th Amendment because, directly or indirectly, it is imposed on income arising from business conducted beyond the boundaries of the state. In considering this objection, we may lay on one side the question whether this is an excise tax purporting to be measured by the income accruing from business within the state, or a direct tax upon that income; for 'the argument upon analysis resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised

under the Federal Constitution.' *Shaffer v. Carter*, 252 U. S. 37, 55, 64 L. ed. 445, 458, 40 Sup. Ct. Rep. 221."

The Supreme Court of the State of Mississippi holds:

(a) That the tax in question is not a tax on the money or property constituting the gain. See 138 Miss. at page 101;

(b) That the act has an extra-territorial effect in that the taxpayer is subjected to liability for gain earned beyond the limits of the state. In respect to it, in 138 Miss. page 108, the court used the following language:

"As to the extra-territorial effect of the act:

"The tax imposed on residents of the state and on domestic corporations is on the whole of their income, whether derived from business within or without the state, and the contention is that the tax is void in so far as it covers income derived from business without the state. The question here presented was ruled against the appellees by the supreme court of the United State in *Maguire v. Trefry*, 253 U. S. 12, 40 S. Ct. 417, 64 L. Ed. 739, and *Shaffer v. Carter*, 252 U. S. 37, 40 S. Ct. 221, 64 L. Ed. 445."

This rule was affirmed by the Supreme Court of the State of Mississippi in the instant case, *Lawrence v. Mississippi State Tax Commission*, 137 So. 503. At page 505, the court used the following language:

"If chapter 32 of Laws of state of Mississippi, Extraordinary Session 1928, is constitutional, of

> course, the appellant is subject to the tax; if such act is unconstitutional, then section 11 of chapter 132, laws of 1924, would remain in force as though the amendment had not been made, and under the said chapter both individuals and domestic corporations would be subject to income tax on the income earned outside of the state as well as income earned within the state. *State v. Gulf, M. & N. R. Co.*, 138 Miss. 70, 104 So. 689, and authorities therein cited."

The Supreme Court of the State of Mississippi has therefore made it perfectly clear that the tax is an excise tax, and that it has extra-territorial effect, that the tax is not a property tax, nor a tax upon the property or money constituting the gain, but is one upon the activities of the owner. This construction of the statute, of course, is binding upon the State of Mississippi as to its scope and effect.

In *Twining v. New Jersey*, 211 U. S. 78, 53 L. Ed. 97, this court used the following language:

> "The judicial act of the highest court of the state, in authoritatively construing and enforcing its laws, is the act of the state. Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676, *Scott v. McNeal*, 154, U. S. 34, 38 L. Ed. 896, 14 Sup. Ct. Rep. 1108; *Chicago B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581."

And in view of the fact that if the act should be held to be property tax it would violate Section 112 of the Constitution of the State of Mississippi. No other construction of the act could reasonably be anticipated on the part of the Supreme Court of the State.

In the case of *New Jersey Bell Telephone Co. v. State Board of Taxes and Assessment of the State of New Jersey*, 280 U. S. 338, 74 L. Ed. 463, at page 347 (280 U. S.) this court used the following language:

> "And, as under the state Constitution, property is required to be assessed by uniform rules according to its true value, the legislature may not reasonably be deemed to have intended direct valuation and assessment of some of the property at local rates and the measurement of the value of other elements of the plant by percentage of gross earnings increasing on a sliding scale from 2 per cent in 1917 to 5 per cent in 1920 and thereafter. *North Jersey Street R. Co. v. Jersey City* (Supreme Court) 73 N. J. L. 481, 63 Atl. 833; (court of errors and appeals) 74 N. J. L. 761, 67 Atl. 33."

In the case of *Louisville Gas & Electric Co. v. Coleman*, 72 L. ed. page 770, 220 U. S., 732, this court at page 36, used the following language:

> "The state court of appeals, in disposing of the contention that the statute violated the state Constitution, held that the tax imposed was not a property tax but a privilege tax, that is, a tax imposed upon the privilege of recording mortgages, etc., the payment of which, it was said, was entirely optional with the owners or holders thereof. This determination of the state court, in so far as it affects the challenge under the state Constitution, we accept as conclusive, in accordance with the well-settled rule. *Merchants Bank v. Pennsylvania*, 167 U. S. 461, 462, 42 L. Ed. 236, 237, 17 Sup. Ct. Rep. 829."

In determining, of course, the validity of the act as applied to the 14th Amendment of the Constitution of the United States, reference must be had to the practical effect of the enforcement thereof. *Panhandle Oil Co. v. Miss.* 277 U. S. 218, 72 L. Ed. 857; *Wagner v. Covington*, 267 U. S. 101, 64 L. Ed. 157.

The practical effect of the act in its enforcement is to levy an excise tax upon income earned in carrying on an occupation beyond the limits of the state. That is what the Supreme Court of the State of Mississippi says the act means, and such is the practical effect given to the act in the enforcement thereof. The rule is well settled that this court is bound by the construction of the Supreme Court of the State of Mississippi as to the scope, meaning and application of the act. But if the tax as construed and enforced by the Supreme Court of the State of Mississippi infringes upon some constitutional right, this court will not be bound by the characterization given to the tax by the state Supreme Court.

In the case of *Hanover Fire Insurance Co. v. Carr*, 71 L. ed. 380, 272 U. S. 494, this court used the following language at page 509:

> "It is true that the interpretation put upon such a tax law of a state by its supreme court is binding upon this court as to its meaning, but it is not true that this court in accepting the meaning thus given may not exercise its independent judgment in determining whether with the meaning given, its effect would not involve a violation of the Federal Constitution. As said by this court

in *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350, at page 59 L. ed. 265, 271, 35 Sup. Ct. Rep. 99, where the question was whether a tax law violated the equal protection clause of the 14th Amendment.

"Upon the mere question of construction we are, of course, concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the State Court. We must regard the substance rather than the (510) form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State."

"This view has been upheld in many cases. *Western U. Teleg. Co. v. Kansas*, 216 U. S., 27, 54 L. ed. 355, 366, 30 Sup. Ct. Rep. 190, *Ludwig v. Western U. Teleg. Co.* 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 59 L. ed. 193, 35 Sup. Ct. Rep. 57; *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346, 67 L. ed. 297, 43 Sup. Ct. Rep. 125.

Other cases directly in point are: *MacAllen Co. v. Massachusetts*, 279 U. S. 620, 73 L. ed. 874; *New Jersey Bell Tel. Co. v. State Board of Taxes and Assessments*, 280 U. S. 338, 74 L. ed. 463; *Storaasli v. Minnesota*, 283 U. S. 57, 75 L. Ed. 839.

While the foregoing rule is thoroughly established, the application thereof presents no difficulty in this case for

the reason that the Supreme Court of the State of Mississippi has given that act extra-territorial effect. So, regardless of what term may be applied to the act the same violates the 14th Amendment to the Constitution of the United States.

In addition to the cases cited upon this point in our original brief, we direct the attention of the court to the recent case of *MacAllen Co. v. Massachusetts*, 279, U. S. 620, 73 L. Ed. 879, where at page 625 the court used the following language:

> "The words of the act and the opinion of the state court as to the nature of the tax are to be given consideration and weight; but they are not conclusive. As it many times has been decided, neither state courts nor legislatures, by giving the tax a particular name or by using some form of words, can take away our duty to consider its nature and effect, *Choctaw, O. & G. R. Co. v. Harrison*, 235 U. S. 292, 59 L. Ed. 234, 237, 35 Sup. Ct. Rep. 27; *Galveston, H. & S. A. R. Co. v.* (626) *Texas*, 210 U. S. 217, 52 L. Ed. 1031, 1037, 28 Sup. Ct. Rep. 638."

The difference between the state and national power in respect to taxing power, stated, *Cook v. Tait*, 265 U. S. 47, 68 L. Ed. 895; *U. S. v. Bennett*, 232 U. S. 299, 58 L. Ed. 612.

## POINT III.

*Even if the tax should be held to be a property tax the tax violates the Constitution of the United States.*

Even if the act should be held to be a property tax, the act as construed and enforced in this case would violate the 14th Amendment of the Constitution of the United States for the following reasons:

1. The property of the appellant, Lawrence, would be taxed at 100 per cent of its value, whereas the Supreme Court of the State of Mississippi has authoritatively stated that other property during the same period of time was customarily assessed at much less than its actual value.

2. The tax imposed upon the appellants' property was at the rate of approximately 5 per cent of the net earned income, whereas the State of Mississippi does not assess other property at exceeding eight mills on the dollar.

3. The tax is on a graduated scale which, if enforced as a property tax, would be unequal and discriminatory as against appellants.

*Hanover Fire Insurance Co. v. Carr,* 272 U. S. 494, *Greene v. Railroad Co.* 244 U. S. 499, 61 L. Ed. 1280; *Hines Yellow Pine Trustees v. Stewart,* C. C. A. 5, 46 Fed. 910. certiorari denied, 283 U. S. ....., 75, L. Ed. 1466; *Knox, Attorney General v. Southern Paper Co.* 108 U. S. 288, 143, Miss. 87.

## POINT IV.

*The Activities of Appellant, While Engaged in Constructing Highways in Tennessee, Not a Chose in Action.*

We have cited in our original brief on the question of the lack of power of the state to extend its taxing authority into other state cases dealing with intangibles, the situs of which follows the domicile of the owner, but the nonliability of the appellant in this case for an excise tax on earnings arising from an occupation carried on in Tennessee rests upon even a stronger basis.

The tax in this case is not a tax upon the contract which the appellant Lawrence made in the State of Tennessee to construct highways. Such would be a property tax and not an excise tax, and would be subject to all of the insuperable constitutional objections under the laws of the State of Mississippi to which we have heretofore directed the attention of the court. The Tax in this case being an excise tax related to the activities of the owner, is one directly imposed upon the work in which the appellant was engaged in the State of Tennessee.

In the case of *Grocery Co. v. Robertson*, 126 Miss. 34, 88 So. 4, at page 52, the court said:

> *"Income is necessarily the product of the joint efforts of the state and the recipient of the income, the state furnishing the protection necessary to enable the recipient to produce, receive and enjoy it."*

This is not a case like that of *First National Bank of Boston v. Maine*, 284 U. S. page....., where the court held that stock in a Maine corporation owned by citizens in Massachusetts was only subject to an excise tax in Massachusetts at the domicile of the owner; nor is it a case like *Safety Deposit Trust Co. v. Virginia*, 280 U. S. 83, 74 L. Ed. 180, where intangible property was placed in the hands of trustees outside of the State of Virginia where the beneficiaries resided. The court held that the income therefrom could not be taxed by the State of Virginia, because the intangibles had acquired a permanent situs beyond the jurisdiction of the state. In this case, not only was the contract made in the State of Tennessee, but the actual building of the highways took place there. That is to say, the

thing which was taxed, the occupation which produced the income, was in Tennessee and could not be attributed to the domicile of the contractor. After the taxpayer earns his money and collects it, as long as the same remains in an intanglible form, the money, or an intangible investment which it may find its way into, would be subject to an ad valorem or property tax in the State of Mississippi, and the income arising therefrom would be subject to an excise tax in the State of Mississippi. In this case, however, the income has not arisen from any intangible situated either in the state or out of the state. Counsel suggests that there is nothing in the record to show that the taxpayer owned any equipment in the State of Tennessee with which the highways were constructed. This is an immaterial fact; whether the taxpayer owned the equipment, borrowed it or leased it, the use thereof in the construction of the highways which produced the gain and profit and took place beyond the limits of the state.

Counsel say that there is nothing to show that the appellant paid the privilege tax in the State of Tennessee which the statutes require for the construction of highways. The truth about the matter is that the State of Mississippi has not the right to tax an occupation carried on in Tennessee by placing an excise tax thereupon whether the State of Tennessee taxes the occupation itself or not. The exaction of a license by the State of Tennessee is not a material injury; but since liability therefor is imposed, there arises a presumption which is well nigh conclusive that the taxpayer has paid the same. Certainly, however, the taxpayer carried on an occupation within the

State of Tennessee, was protected by its laws, and incurred liability therefor. We are informed, since the writing of our original brief, that in the meantime the State of Tennessee has imposed an excise tax in the nature of an income tax upon the same occupation, but we have been unable to obtain a copy thereof.

Appellees' counsel take the position that if appellants' theory of the case is correct, a resident of Mississippi might take intangible property, like money or notes, deposit the same in another state, and escape taxation thereupon, but such is not the appellants' position at all. Distinction must be drawn between an excise tax and a property tax. If Mr. Lawrence should earn $50,000.00 in Tennessee and place the same in a bank, either in Mississippi or in Tennessee, such money would become subject to an ad valorem or property tax, if liable therefor; *Fidelity Trust Co. v. City of Louisville*, 245 U. S. 54, 62 L. Ed. 145; and the regular state levy, shown not to exceed eight mills, would be imposed thereupon. This, however, would be a property tax, and we have pointed out to Your Honors, Appendix 3, page 59, of our original brief, that money on deposit in a bank is exempt from ad valorem or property taxation. But suppose that the taxpayer deposited this money in a Tennessee bank and earned interest therefrom. Since the money is an intangible chose in action, and its situs would follow the domicile of the owner, the interest earned on the money would be subject to an excise tax by the State of Mississippi just as if the taxpayer had bonds, notes or other securities in a vault in the State of Tennessee; the income thereupon would be subject to an excise tax in the State

of Mississippi, but the tax on such income would not be a property tax. According to the decisions of the State of Mississippi, the tax would be an excise tax. So, any stocks, bonds, notes or securities which the taxpayer might deposit in a vault in Tennessee would be subject to a property tax by the State of Mississippi for the reason that the situs thereof would follow that of the owner, and, if taxable in the state, the fact that the same was situated in Tennessee would not make the property any less taxable, but the tax would be an ad valorem or property tax, and not an excise tax. However, the building of highways in Tennessee by the appellant is not a chose in action which follows the domicile of the owner, but a tax upon the income derived from such occupation, is a tax upon the activities of the appellant while engaged therein, and not a tax upon the income from tangibles situated in the State of Tennessee. In other words, the act of the appellant in following the occupation of building highways in Tennessee is not the same as the position of a resident of the State of Mississippi receiving income from intangible securities placed in a vault in Tennessee, which at the same time follow the domicile of the owner. The legal situation of the appellant, while following the occupation of building highways in Tennessee is more nearly related to a person owning real estate or tangible personal property in Tennessee, the income of which is sought to be taxed as an excise in Mississippi. We are not asking the court to hold that the State of Mississippi could not enforce an excise tax against the increment arising from intangibles, although located in another state. Such intangibles would follow the domicile of the owner, We are complaining, however, of a construction of the stat-

ute which justifies the levying of an excise tax upon an occupation carried on beyond the limits of the state.

## POINT V.

## *DOMESTIC CORPORATIONS NOT LIABLE FOR THE TAX.*

We could add little to the argument contained in our original brief upon this branch of the case. Counsel cite, however, *Franklin v. Carter*, C. C. A. 10, 51 Fed. (2) 345. The court in that case justified the classification because stockholders would be required to pay the tax from dividends declared by the corporation, and that, therefore, double liability would be created and that the classification was justified in order to prevent this duplication. In the Mississippi statute, however, this duplication would not take place. If the corporation paid the tax the stockholders would not be required to return the dividends declared.

Subdivision 8, paragraph (b), Section 5033, being part of Appendix 1 of our original brief, at page 53 thereof, contains the following provision:

> "Income received during the taxable year as dividends from a corporation on which such corporation has already paid or is liable by assessment to pay an income tax, or dividends from a national bank or state bank organized under the laws of the state of Mississippi."

Therefore, the classification does not classify in the present instance. Counsel say, however, that the Supreme Court of Mississippi decided that if that portion of the act

relieving domestic corporations from liability created undue discrimination (which it did not decide, however) in such case domestic corporations would be liable. We call Your Honors attention, however, to the fact that, according to the admitted allegations of the bill of complaint, the state through its taxing body relieved domestic corporations of such liability for the year 1929, and the Supreme Court of the State of Mississippi of itself could not compel it to impose the liability so that regardless of what the Supreme Court of the State of Mississippi may have said in this case, if the classification is not justifiable the Supreme Court of the State of Mississippi is powerless to remove the discrimination, and such discrimination not only exists but has been approved by the judgment of the Supreme Court of the State of Mississippi in this case.

We respectfully submit that the judgment appealed from was erroneous and should be reversed.

Respectfuly submitted,

W. H. WATKINS,
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Attorneys for Appellants.

## APPENDIX I.

*Chapter* 16, *Mississippi Legislature, Extraordinary Session* 1928.

Section 1. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI, That a state ad valorem tax of six mills on each dollar of assessed valuation for the year 1928 and a tax of six mills on each dollar of assessed valuation for the year 1929 is hereby levied on all taxable property in the State of Mississippi.

*Chapter* 161, *Mississippi Laws of* 1930.

Section 1. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI, That a state ad valorem tax of eight mills on the dollar for the year 1930 and eight mills on the dollar for the year 1931 is hereby levied on all the taxable property in the State of Mississippi.

Section 2. That this act shall take effect and be in force from and after its passage.

## APPENDIX NO. II.

*Section* 135 *Constitution of the State of Mississippi.*

"There shall be a sheriff, coroner, assessor and surveyor for each county to be selected as elsewhere provided herein, who shall hold their office for four years. The sheriff shall be ineligible to immediately succeed himself in office. The duties heretofore imposed on the county treasurer shall be discharged by some person or persons selected as required by law."